

STATE OF MICHIGAN
COURT OF APPEALS

THELMA JOHNSON, Personal Representative of
the Estate of CARL JOHNSON,

UNPUBLISHED
August 12, 2010

Plaintiff-Appellant,

v

HURLEY MEDICAL GROUP, P.C., doing
business as HURLEY MEDICAL CENTER, and
DR. MOONGILMADUGU INBA-VASHVU,
M.D.,

No. 287587
Genesee Circuit Court
LC No. 00-069254-NH

Defendants-Appellees,

and

KENNETH JORDAN, M.D.,

Defendant.

Before: GLEICHER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff appeals as of right from an order granting defendants summary disposition on the ground that plaintiff's notice of intent, required under MCL 600.2912b(4), was deficient.¹ We reverse and remand, and decide this appeal without oral argument pursuant to MCR 7.214(E).

Plaintiff's notice of intent set forth in pertinent part as follows:

¹ This case previously came before this Court in *Johnson v Hurley Medical Group, PC*, 270 Mich App 575; 716 NW2d 611 (2006), rev'd 480 Mich 1047 (2008).

1. FACTUAL BASIS FOR CLAIM

On November 22, 1997, Carl Johnson was admitted to Hurley Medical Center with a diagnosis of atypical chest pain, rule out unstable angina and myocardial infarction. Carl Johnson was then discharged on November 23, 1997 with instructions to continue Zestil, Dyazide and (Nalfon) Fenoprofen and to maintain low salt, low cholesterol and low sugar diet. Mr. Johnson was also instructed to see his family physician Dr. Jordan^[2] in one week and to schedule an out patient stress cardiolyte test with Dr. Vaghu (Dr. Inbavazhvu). Mr. Johnson scheduled and was examined by Dr. Inbavazhvu on November 26, 1997 and scheduled for the stress test on December 2, 1997. Later in the evening on November 26, 1997, Mr. Johnson suffered a massive heart attack and died.

2. THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

The standard of care upon discharge from the hospital and evaluation by Dr. Inbavazhvu was to prescribe baby aspirin, beta blockers, and restriction of activities until the source of the atypical chest pain was determined.

3. THE MANNER IN WHICH IT IS CLAIMED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED.

See Paragraph No. 2 Above.

4. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE.

See Paragraph No. 2 Above.

5. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF INJURY CLAIMED IN THE NOTICE.

Had defendants complied with the standard of care, Carl Johnson would not have suffered a massive heart attack leading to his demise.

The circuit court deemed the notice of intent deficient under *Boodt v Borgess Medical Ctr*, 481 Mich 558; 751 NW2d 44 (2008). The Supreme Court in *Boodt* held in relevant part as follows:

Regarding causation, the notice of intent states: “If the standard of care had been followed, [the decedent] would not have died on October 11, 2001.” This statement does not describe the “manner in which it is alleged the breach of

²The parties dismissed Dr. Jordan from the case by stipulation. *Johnson*, 270 Mich App at 578 n 1.

the standard of practice or care was the proximate cause of the injury claimed in the notice,” as required by MCL 600.2912b(4)(e). Even when the notice is read in its entirety, it does not describe the manner in which the breach was the proximate cause of the injury. When so read, the notice merely indicates that [the defendant] caused a perforation and that he then failed to do several things that he presumably should have done. . . . However, the notice does not describe the manner in which these actions or the lack thereof caused [the] death. As this Court explained in *Roberts v Mecosta Co General Hosp (After Remand)*, 470 Mich 679, 699-700 n 16; 684 NW2d 711 (2004), “it is not sufficient under this provision to merely state that defendants’ alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury.” (Emphasis in original).

Although the instant notice of intent may conceivably have apprised [the defendant] of the nature and gravamen of plaintiff’s allegations, this is not the statutory standard; § 2912b(4)(e) requires something more. In particular, it requires a “statement” describing the “manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.” MCL 600.2912b(4)(e). The notice at issue here does not contain such a statement. [481 Mich at 560-561 (footnote omitted).]

Plaintiff suggests that the notice of intent, in its entirety, adequately advises that the failure to restrict activities and prescribe baby aspirin and beta blockers resulted in the decedent’s heart attack. However, even reviewing the notice as a whole, the notice at most offers merely a statement that the failure to follow the standard of care caused the decedent’s death. Stated differently, the notice does indicate that defendants failed to take particular actions, but the notice does not further describe the manner in which these alleged failures caused the decedent’s death. In a fashion virtually identical to the deficient proximate causation notice examined in *Boodt*, plaintiff’s notice here neglects to supply any information addressing how defendants’ failures *proximately* caused the decedent’s death. Consequently, we cannot meaningfully distinguish the instant notice from the notice deemed insufficient in *Boodt*.

The medical malpractice described in plaintiff’s notice occurred in 1997, and plaintiff filed her lawsuit in 2000. Plaintiff relied on the tolling provision then in effect to permit the filing of this case after the otherwise applicable two-year statute of limitations period contained in MCL 600.5805(5) had expired. At that time, MCL 600.5856(d) supplied the applicable tolling provision. In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002) (*Roberts I*), the Supreme Court held that a notice of intent that failed to comply with all requirements of MCL 600.2912b(4) did not toll the statute of limitations. In *Bush v Shabahang*, 484 Mich 156, 165-170; 772 NW2d 272 (2009), the Supreme Court recognized that the 2004 amendment of MCL 600.5856(c) eliminated this aspect of *Roberts I*. In light of the 2004 amendment, a plaintiff who mails a notice later deemed defective in some respect may nevertheless claim the tolling period now set forth in MCL 600.5856(c).

If *Roberts I* and *Boodt* supplied the only pertinent authority regarding the effect of plaintiff's defective notice of intent filed pursuant to former MCL 600.5856(d), we would conclude that the circuit court properly granted defendants' motion for summary disposition.³ However, given the Supreme Court's recent decision in *Bush*, 484 Mich at 185, the absence of tolling under former § 5856(d) does not alone suffice to resolve this case. In *Bush*, the Supreme Court invoked MCL 600.2301 in support of its holding that a plaintiff may through amendment bring a defective notice of intent into compliance with MCL 600.2912b(4). *Id.* at 176-178. In reaching this holding, the Supreme Court neglected to address whether a plaintiff who mailed a notice of intent before the 2004 amendment of § 5856(c) may nevertheless claim the benefit of amendment under § 2301. The instant case presents precisely this question.

We acknowledge that in one respect, the Supreme Court's holding in *Bush* dictates that plaintiff should have been permitted to amend her notice of intent, and that her amended notice of intent would relate back to the date that she mailed the original NOI, "in accord with the treatment afforded to pleadings when amended under MCR 2.118(D)." *Bush*, 484 Mich at 181 n 44. But the *Bush* Court declined to overrule the holding in *Roberts I*, although the Supreme Court in *Bush* expressed dissatisfaction with the holding in *Roberts I*:

[W]e question whether *Roberts I* and *Boodt* were correctly decided, as they failed to consider the entire legislative scheme and the legislative history involved. However, because the NOI and filing in this case occurred after 2004, this issue is not before us and we will refrain from deciding this issue in the present case. [*Bush*, 484 Mich at 175-176 n 34.]

That *Bush* did not overrule *Roberts I* appears to leave intact the *Roberts I* Court's ruling that a plaintiff who mailed a defective notice of intent before the effective date of the 2004 amendment of MCL 600.5856(c) could not claim the benefit of the 182-day tolling period contained in MCL 600.2912b.

If the only issue presented here concerned plaintiff's ability to cure by amendment the defective notice of intent under § 2912b(4), *Bush* would mandate that we afford plaintiff an opportunity to amend her notice. But this case presents a second issue: whether the amendment process adopted by the *Bush* Court also applies to § 5856(d) as it existed before the 2004 amendment. We conclude that the amendment process endorsed by the Supreme Court in *Bush* also extends to former § 5856(d). We find it anomalous to conclude that an amended notice of intent filed after 2004 under § 5856(c) would relate back to the original notice's mailing date, as *Bush* dictates, but that an amendment of a notice of intent filed under former § 5856(d) would not relate back to the date of the original notice's filing. We find further support for our view in another aspect of the Supreme Court's decision in *Bush*. The Supreme Court in *Bush* observed, "A review of the legislative history reveals that the Legislature did not intend for a defect in an

³ Defendants sought summary disposition pursuant to MCR 2.116(C)(7), (8) and (10), but the circuit court did not specify pursuant to which subrule it found summary disposition appropriate. Given that the essence of defendants' motion and the circuit court's ruling involves whether the statute of limitations has run, we find (C)(7) the appropriate subrule.

NOI to be grounds for dismissal with prejudice based on § 2912b. The clearest indication for this conclusion was the Legislature’s complete rejection of a mandatory dismissal clause.” 484 Mich at 173. According to *Bush*, amendment served the underlying purpose of § 2912b, while dismissal with prejudice did not.

Consequently, we conclude that in conformity with the Supreme Court’s amendment analysis in *Bush*, plaintiff must have an opportunity to amend her notice of intent. If plaintiff amends her notice to bring it into compliance with MCL 600.2912b(4), the amended notice will relate back to the original mailing date, and plaintiff may then claim the benefit of the 182-day tolling period in current § 5856(c).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder